SUPREME COURT, U. S.
SEP 30

In The

Supreme Court of the United States

October Term, 1974

No. 74-38

DAVID T. YOKOZEKI, *Petitioner,*
v.
THE STATE BAR OF CALIFORNIA, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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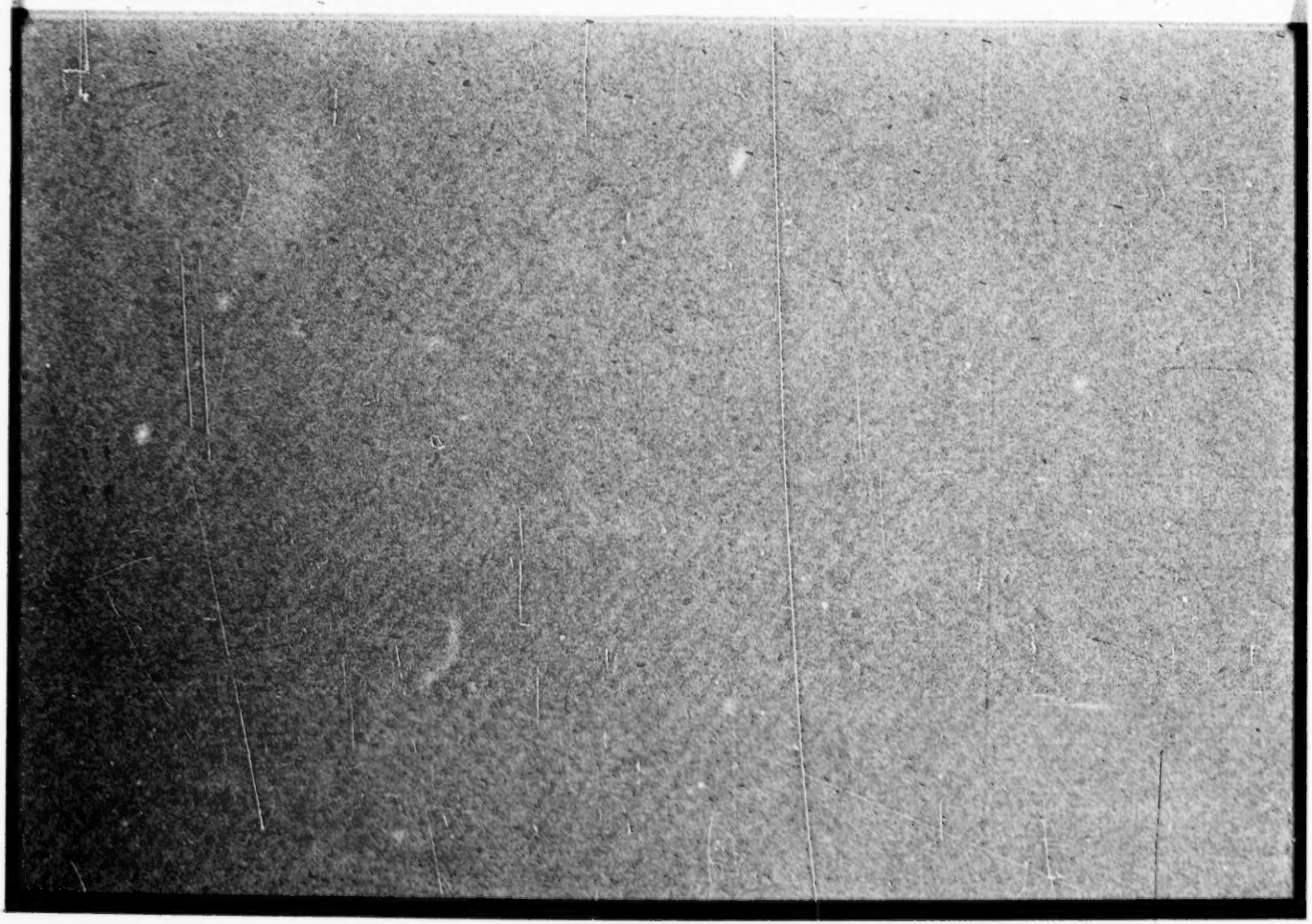

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PRELIMINARY STATEMENT AND DECISION BELOW

This is a brief in opposition to a Petition for Writ of Certiorari (28 U.S.C. §1257(3)) to review a reported decision of the Supreme Court of California in an attorney disciplinary matter. *Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 113 Cal.Rptr. 602, 521 P.2d 858 (rehearing denied by minute order of June 5, 1974).[1] For convenience of this Court, a copy of the decision below is attached as an Appendix.

[1] In the State of California, the admission of attorneys to practice law and their discipline are vested exclusively within the inherent power of the Supreme Court of California (not a party to this Certiorari proceeding). RESPONDENT, The State Bar, has no power to suspend or disbar an attorney licensed in California. Only the Supreme Court of California may do so. Such Supreme Court action follows its *independent* review of the record of disciplinary proceedings and its exercise of its *independent* judgment. See, among many cases, *Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 443; 113 Cal.Rptr. 602, 521 P.2d 858 (Appendix at 8); *Bernstein v.*

In the decision below, the Supreme Court of California ordered PETITIONER, a California attorney suspended from the practice of law for a period of five (5) years or until he makes restitution to his former client, whichever is the greater period. See Appendix, pp. 6 and 16. The decision below is now effective. No stay is in effect.

QUESTION PRESENTED

Is any Federal Constitutional question raised by the record of a California attorney discplinary proceeding where the accused attorney, PETITIONER, received actual notice of the formal charges against him, where he received notices giving him a total of 14 months to prepare for an evidentiary hearing on the charges against him and to appear at that hearing in person or by counsel, where he failed to appear at that hearing in person or by counsel but where he was later represented by counsel in two subsequent independent review proceedings which must be held before he could have been suspended from practice in California?

RESPONDENT'S STATEMENT OF THE CASE

The record below shows actual notice to PETITIONER of the formal disciplinary charges against him and generous opportunities to PETITIONER, over a period of 14 months thereafter

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State Bar (1972) 6 Cal.3d 909, 916, 101 Cal.Rptr. 369, 495 P.2d 1289; *Arden v. State Bar* (1959) 52 Cal.2d 310, 315-316, 341 P.2d 6.

RESPONDENT State Bar is a public corporation within the judicial branch of California government. Cal. Constitution, Art. VI, Sec. 9; Cal. Business and Professions Code, sections 6001-6008. In part, RESPONDENT assists the Supreme Court of California as that Court's "administrative arm" in receiving complaints against attorneys from members of the public, in receiving applications for admission to practice law and in conducting appropriate proceedings and hearings thereon leading to recommendations to the Supreme Court of California for the admission, discipline or reinstatement of attorneys in this State. Cal. Business and Professions Code, sections 6040-6117; e.g., *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300-301, 19 Cal.Rptr. 153, 386 P.2d 697; *Chronicle Publishing Co. v. Superior Court* (1960) 54 Cal.2d 548, 565-566, 7 Cal.Rptr. 109, 354 P.2d 637.

to prepare for and to appear either in person or by counsel at an evidentiary hearing on the charges. Further, although PETITIONER failed to appear at the evidentiary hearing, that did not turn the hearing into a "default" proceeding. A complete record of evidence was adduced on the formal charges at the evidentiary hearing, despite PETITIONER'S non-appearance. That record was made available to PETITIONER. Subsequently, and before any discipline was imposed on PETITIONER, he appeared by counsel at two review hearings before RESPONDENT'S statewide Disciplinary Board (see Cal. Business and Professions Code, section 6086.5) and before the Supreme Court of California, sitting *en banc*. Each of these bodies exercised its independent judgment on the evidence and on PETITIONER'S claims of procedural irregularity. See Appendix, pp. 8-12.

More particularly, the record below shows as follows:

A. *PETITIONER Received Actual Notice Of The Formal Disciplinary Charges Against Him.*

1. *The Preliminary Investigation.*

In June, 1970, Dr. Chang Ha Kim, M.D., presented a complaint to RESPONDENT State Bar alleging that PETITIONER had committed certain professional misconduct. See Appendix, pp. 5-8 and 10. At that time, PETITIONER was living in Japan after having moved there from California in 1969. Appendix, pp. 7-8.

Dr. Kim's complaint concerning PETITIONER was investigated in 1970 and 1971 first by a staff attorney employed by RESPONDENT, then by a local administrative committee of RESPONDENT known as a "preliminary investigating committee." Cal. Business and Professions Code, Sections 6040-6044; Rules 4-6, 19-23; Exh. 27.[2]

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[2]Citations supporting the chronology of proceedings include references to the record below such as "Exh." referring to the Exhibits and "Rep.T." referring to the Reporter's Transcripts of Hearings Before Local Administrative Committee No. 16 for the County of Los Angeles. Citations to "Rules" are to the Rules of Procedure of the State Bar of California. The Supreme Court of California has often held that State Bar proceedings are

During the course of the preliminary investigation, PETITIONER was notified by RESPONDENT of the pendency of that investigation and he was given an opportunity by the preliminary investigating committee to submit whatever statements he wished, if any. PETITIONER was also given an opportunity by that committee to appear in Los Angeles at a hearing on the matter. Rules 10, 21 and 23. Between August and November, 1970, PETITIONER submitted three detailed letters. Exh. 27. Each letter responded to the charges raised against him in the preliminary investigation.[3]

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sui generis. They are neither civil nor criminal in nature. *Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 447, 113 Cal.Rptr. 602, 521 P.2d 858 (Appendix, p. 12); *Eschwig v. State Bar* (1969) 1 Cal.3d 8, 18, 81 Cal.Rptr. 352, 459 P.2d 904; *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300-301, 19 Cal.Rptr. 153, 386 P. 2d 697. Although State Bar proceedings are *sui generis,* they are governed exclusively by the Rules of Procedure of the State Bar which, according to the Supreme Court of California, provide a "panoply of legal protection" to an attorney accused of professional misconduct and insure that administrative due process will be observed. *Schullman v. State Bar* (1973) 10 Cal.3d 526, 537, 111 Cal.Rptr. 161, 516 P.2d 865. For convenience of this Court, the Annotated Rules of Procedure are published in West's California Annotated Business and Professions Code (following section 6087) and in Deering's Annotated California Codes, "Rules" volumes. Local administrative Committees of RESPONDENT were, at the time of these hearings, composed of three attorneys who were appointed by RESPONDENT'S Governing Board and who sat as "public officers" for the purpose of receiving evidence and making recommendations to the State Bar in Disciplinary matters. See *Chronicle Publishing Co. v. Superior Court* (1960), 54 C.2d 548, 565-566, 7 Cal.Rptr. 109, 354 P.2d 637.

[3]PETITIONER chose not to travel from Tokyo to Los Angeles, for the scheduled preliminary investigation hearing citing several reasons, including illness, the expense of the trip and interference with his then present employment for a Japanese shipping company. Instead, PETITIONER suggested alternatives to his prompt attendance at a preliminary hearing in Los Angeles: That the preliminary investigating committee grant him a continuance until he returned to the United States (at some unspecified later date); or, if the preliminary investigating committee were unwilling to continue the matter, then to permit PETITIONER to respond to the charges as by sworn replies from Tokyo to inquiries posed by RESPONDENT'S Committee. Exh. 27.

2. *The Formal Proceeding.*

Formal disciplinary charges were issued against PETITIONER on August 25, 1971. On December 25, 1971, PETITIONER accepted service in Tokyo, Japan, of the following documents:

–A Notice to Show Cause consisting of a statement of the formal charges against PETITIONER;

–A copy of the Rules of Procedure of the State Bar;

–A Notice setting the date of a formal evidentiary hearing on March 22, 1974 (see *infra*); and

–A sheet showing the names and addresses of RESPONDENT'S Examiner (who would present the Evidence for RESPONDENT on the Notice) and the names and addresses of the local administrative committee which would conduct the Evidentiary Hearing. See Rule 25-31; Exh. 27; Notice to Show Cause; Appendix at 10.

B. *Generous Opportunities Were Afforded PETITIONER Over A Total Of 14 Months, To Prepare For And To Appear In Person Or By Counsel At An Evidentiary Hearing On The Formal Disciplinary Charges Against Him.*

As noted *supra*, when PETITIONER accepted service of the Notice to Show Cause, in late December, 1971, he was notified of the formal hearing on March 22, 1972. The hearing date was set for March 22, 1972, in order to afford PETITIONER (as well as the State Bar examiner) ample time to complete prehearing discovery afforded the parties by the Rules of Procedure of the State Bar as well as to afford PETITIONER ample opportunity to prepare for the hearing. Rules 14-14.20, 15-26; see Notice of Continuance of Hearing, dated November 17, 1971; Appendix at 10.

On January 1, 1972, PETITIONER served a six page Answer to the Notice to Show Cause. This Answer consisted of a two page denial of the material allegations of the Notice and a four page, detailed statement of PETITIONER'S view of the facts,

by way of "affirmative defense." See Answer to Notice to Show Cause.[4]

Also on January 1, 1972, PETITIONER mailed a six page letter to RESPONDENT'S Examiner setting forth another detailed statement of PETITIONER'S view of the facts alleged in the Notice to Show Cause. Also in this letter, it appears that PETITIONER was employed by one or more Japanese companies, he stated he had no intentions of returning to California to practice law or attend the hearing, apparently due to his physical ailment of low blood pressure and due to limited financial resources. Exh. 27. PETITIONER suggested various stipulations which could be entered into in order to limit the areas in dispute. He also requested that testimony be taken of a "key witness" as to the charges, a Mr. Yoshino who was then living near Kobe, Japan.

PETITIONER concluded this letter as follows:

> ". . . In order to safeguard my rights in this respect, *I'm willing to stipulate to any date for hearing* which I can't attend anyway *if sufficient time is allowed to complete a full and complete informal and formal discovery.*" (Emp. added) Exh. 27.

In early February, 1972, PETITIONER wrote a letter to RESPONDENT'S Los Angeles office. PETITIONER reiterated that he would not be able to attend the formal hearing set for March 22, 1972, and agreed to stipulate that the hearing date may be set without notice to him "at any time after conclusion of informal discovery procedure." Exh. 27.

The local administrative committee (hereinafter "trial committee") continued the March 22, 1972 hearing date to May 25, 1972 to permit the testimony of Mr. Yoshino to be taken in Japan upon written interrogatories. See Order of Committee

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[4] In a six page letter which PETITIONER mailed to the State Bar from Tokyo on December 25, 1971 just prior to filing his Answer, PETITIONER submitted a separate detailed statement of his version of the material facts. Exh. 27.

for Commission to take Deposition out of state dated April 14, 1972; Order of Committee dated June 16, 1972.

On May 25, 1972, the formal proceedings came on for hearing, with State Bar witnesses present and RESPONDENT'S Examiner ready to proceed. At this time the Examiner outlined a procedure whereby a transcript would be made of the witnesses' testimony, and PETITIONER (in Japan) would be permitted to submit written questions, by cross-examination, to be asked the witnesses at a further hearing. Rep. T. 3/24-4/9. After some colloquy, the (then) trial committee rejected the proposed procedure on the ground it might be unduly prolonged. It continued the case "in order to advise PETITIONER how we are going to proceed *so this matter will not be dragged out unduly.*" (Emp. added) Rep. T. 6/24-27.

On August 21, 1972, a newly assigned trial committee, with the Examiner present, granted PETITIONER'S written motion to amend the Answer. The Committee received from the Examiner a list of his proposed witnesses and exhibits, and stated its intent to hear the case "on a formal basis" on November 2, 1972. The Chairman of the trial committee outlined a procedure whereby PETITIONER, by certain date, could present his own testimony by deposition in Tokyo,[5] with the right of the Examiner by written interrogatories to propound questions to PETITIONER and PETITIONER could submit to the committee in advance questions to be asked State Bar witnesses. PETITIONER could have his own witnesses subpoenaed and submit questions to be propounded to such witnesses. Rep. T. 10/28-15/25. The Chairman of the trial committee stated on the record that the committee strongly recommended that (PETITIONER) obtain the services of counsel to protect his rights at the formal hearing (Rep. T. 13/15-17) and (PETITIONER) would be expected to have ready the necessary depositions, affidavits or other evidence he desires to produce on the new date scheduled for hearing: November 2, 1972 (Rep. T. 15/22-25).

[5]As of that date, the State Bar was not informed of PETITIONER'S new residence in Guam.

On October 30, 1972, PETITIONER'S written motion for a continuance of the trial committee hearing in order to obtain counsel was received. Exh. 27; Rep. T. 20/2-3. An attorney PETITIONER sought to represent him, Mr. William J. Bluestein, did not receive a letter PETITIONER had sent him dated October 12, 1972 because it was incorrectly addressed. However, RESPONDENT promptly delivered a copy of this letter to Mr. Bluestein (at PETITIONER'S request) on October 30, 1972. Rep. T. 20/14-23/11. Attorney Bluestein declined to appear for PETITIONER at that time, but stated that he would consider representing him. Rep. T. 19/16-28, 21/15-25.

On November 2, 1972, the evidentiary hearing did not proceed but the trial committee *again* continued that hearing to February 26, 1973, "for the purpose of permitting [PETITIONER] to obtain counsel and to afford such counsel an opportunity to prepare for such hearing. [PETITIONER] is to notify the Examiner and the State Bar forthwith of the name of his counsel when such counsel has been retained. Should [PETITIONER] fail to obtain counsel this matter shall in any event proceed to hearing on February 26, 1973." Rep. T. 24/10-25/28. The committee also vacated all prior orders concerning the procedures to be followed in the formal hearing. Rep. T. 25/28-26/4.

A transcript of the trial committee proceedings of November 2, 1972, was sent to PETITIONER by RESPONDENT on November 9, 1972. Rep. T. 28/3-10/15. On January 9, 1973, an Assistant Secretary of RESPONDENT wrote to PETITIONER in Guam, confirming the date of the hearing as February 26, 1973. Rep. T. 33/4-34/3.

On January 17, 1973, PETITIONER wrote to RESPONDENT'S Assistant Secretary from Guam. That letter, in part, stated Mr. Bluestein would not represent PETITIONER without cash, which PETITIONER was trying to raise. Rep. T. 32/14-22; Exh. 27. This letter did not request appointment of counsel for PETITIONER nor is there any indication that PETITIONER would have accepted appointed counsel.

On February 26, 1973, some 14 months after PETITIONER had been served with the formal charges against him, the trial committee felt obligated to proceed and conduct an evidentiary hearing. Rep. T. 34/9-19.[6]

C. *Although PETITIONER Did Not Appear At The Evidentiary Hearing Of February 26, 1973, Either In Person Or By Counsel, That Hearing Was Not A "Default" Hearing. Evidence Was Required To Be Adduced On The Substantive Charges Against PETITIONER And A Full Record Of Evidence Was Adduced.*

At the evidentiary hearing of February 26, 1973, PETITIONER did not appear in person or by counsel.

It appears that counsel attempted to contact RESPONDENT on February 26, 1973, but after the trial committee's evidentiary hearing had concluded.

Although there was no appearance by or on behalf of PETITIONER at the February 26, 1973 hearing, his default could not be entered and his failure to appear could not, standing alone, be taken as sufficient proof of the truth of the formal charges against PETITIONER. Rather, it was the duty of RESPONDENT'S Examiner to bring before the trial committee sufficient detailed evidence that the committee may adequately make a determination on the formal charges. Rules 32 and 34.1.

The record below reveals that RESPONDENT'S Examiner adduced extensive evidence on the charges at the February 26, 1973 hearing. The Examiner presented four witnesses to the trial committee and voluminous documentary evidence includ-

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[6]The Chairman of the trial committee stated on the record in part, that "[t]his hearing was set at the hearing of November 2, 1972 in sufficient time to give [PETITIONER] an opportunity to obtain counsel, which he has not done, and we feel that due to the long delay in this matter that we must now proceed with the hearing. [PETITIONER] has had an opportunity to introduce evidence, and the file reflects that he has been granted every reasonable opportunity that we feel would be required to protect his interests." Rep. T. 34/9-19; also see Findings (etc.) of Trial Committee, pages 2-3–"Jurisdiction to Proceed."

ing many of PETITIONER'S numerous written communications over more than a two year period (see Exh. 27).

After seeing and hearing the witnesses and reviewing the documentary evidence, the trial committee unanimously found PETITIONER culpable of professional misconduct and recommended that he be suspended from practice for five years. Appendix, pp. 5-6.

D. *PETITIONER Appeared By Counsel Of His Choice At A Subsequent Independent Review Hearing Before RESPONDENT'S Disciplinary Board.*

Under the Rules of Procedure of the State Bar all trial committee actions must be independently reviewed by RESPONDENT'S Disciplinary Board, with narrow exceptions not applicable here. Rules 38-42 and 80-89.

It is well settled that RESPONDENT'S Disciplinary Board exercises its independent judgment on the evidence adduced by the trial committee and the Disciplinary Board is not bound by the findings of the trial committee; the Disciplinary Board may render findings of fact and draw conclusions from such findings at variance with the committee's. It is RESPONDENT'S Disciplinary Board (and not the trial committee) which ultimately makes the findings and recommendation to the Supreme Court of California. See, e.g. *Bernstein v. State Bar* (1972) 6 Cal.3d 909, 916, 101 Cal.Rptr. 369, 495 P.2d 1289.

On June 14, 1973 PETITIONER appeared through counsel (Mr. Bluestein) at the independent review hearing before RESPONDENT'S Disciplinary Board.[7] A preliminary motion by PETITIONER'S counsel for a trial committee hearing *de novo*, or alternatively for the reopening of that hearing for the introduction of additional evidence was denied. Immediately there-

[7]RESPONDENT'S Disciplinary Board is a statewide board of 15 members who act as public officers in reviewing disciplinary proceedings against members of RESPONDENT and in making findings and recommendations of discipline to the Supreme Court of California. See California Business and Professions Code, Sections 6078, 6086.5; Rules 38-42(a), 80-89; *Chronicle Publishing Co. v. Superior Court, supra* at pp. 2 and 4.

after, both PETITIONER'S counsel and RESPONDENT'S Examiner addressed the Disciplinary Board on the merits of the proceeding. Thereafter, the Disciplinary Board resolved by unanimous vote to adopt the trial committee's findings of PETITIONER'S culpability. By vote of eleven to two the Disciplinary Board recommended that PETITIONER be disbarred from practice. See Disciplinary Board Minutes of June 14, 1971; Appendix, pp. 5-6.

E. *PETITIONER Participated In The Independent Review By The Supreme Court Of California Of The Disciplinary Board's Recommendation.*

As noted *supra*, pages 1-2 (footnote) the imposition of suspension or disbarment on a California attorney is vested exclusively in the Supreme Court of California. The findings and recommendation of the trial committee and Disciplinary Board do not bind the Supreme Court of California. The Supreme Court of California exercises its *independent* judgment on the evidence. See *Bernstein v. State Bar, supra*, pp. 1-2 and 10.

PETITIONER contested the Disciplinary Board's recommendation for his disbarment in the Supreme Court of California. He filed an opening brief *in propria persona* and then retained his present counsel (Mr. Dreyfus) who filed a detailed brief and ably represented PETITIONER at oral argument before the Court below, sitting *en banc*. After its independent review of the record, the Supreme Court of California found PETITIONER culpable but declined to order PETITIONER disbarred. Instead, the Court below imposed the suspension on PETITIONER described, *supra*, page 2.

ARGUMENT

PETITIONER HAS FAILED TO DEMONSTRATE ANY SUBSTANTIAL FEDERAL QUESTION IMPROPERLY DECIDED BY THE COURT BELOW AND THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT PETITIONER NOW SEEKS.

This is a review of a state's attorney disciplinary proceeding and we would respectfully commend to this Court the observation of Mr. Justice Frankfurter writing for the Court in *Theard v. United States* (1957) 354 U.S.278, 281, that except for "narrow limits" it is not for this Court to sit in judgment on State Court attorney disciplinary proceedings.

PETITIONER seeks review on only the procedural ground that his Fourteenth Amendment rights were allegedly violated because he was not physically present or represented by counsel at the trial committee hearing and did not expressly waive those rights. See Petition at 3.

PETITIONER has cited no authority to support his contention that the procedures followed in the proceeding below were legally or constitutionally defective. We submit that PETITIONER could not make such a showing.

As pertinent here, Constitutional principles (as well as the law of California) are fully satisfied so long as the procedure in an attorney disciplinary proceeding includes fair notice of the charges and "*opportunity* to be heard" (Emp. added). *In re Ruffalo* (1967) 390 U.S.544, 550; *Selling v. Radford* (1917) 243 U.S.46, 51; see also California Business and Professions Code Section 6085.[8]

Here we submit that there can be no dispute that PETITIONER received abundant and actual written notice of the formal charges against him and of the Rules of Procedure of the State Bar governing proceedings on these charges. See *supra*, page 5.

In a 1973 opinion by the Supreme Court of California in an attorney disciplinary proceeding (written prior to the decision

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[8]California Business and Professions Code Section 6085 provides: "Any person complained against shall be given reasonable notice and have a reasonable opportunity and right: (a) To defend against the charge by the introduction of evidence. (b) To be represented by counsel. (c) To examine and cross-examine witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to appear and testify or produce books and papers, as provided in this chapter."

below) *Schullman v. State Bar* (1973) 10 Cal.3d 526, 537, 111 Cal.Rptr. 161, 516 P.2d 865, the Court below concluded that the Rules of Procedure of the State Bar provide accused attorneys with a "panoply of legal protection," "and insure that administrative due process will be observed." Further, the Supreme Court of California in the *Schullman* case *supra*, described specifically the protection to an accused attorney provided by the Rules:

> *"The rules provide for adequate notice of charges, and allow attorneys an opportunity to be heard, to present a defense, to subpoena books and records as well as to confront and cross-examine witnesses."*
> (Emp. added) 10 Cal.3d at 537.

Here PETITIONER received all of the benefits provided for by the Rules of Procedure of the State Bar in obtaining pre-hearing discovery and he received a generous opportunity to appear at an evidentiary hearing. Hearing dates were repeatedly continued to future dates by the trial committee over a period of a year and two months in an attempt to accommodate PETITIONER'S requests and his situation. See *supra*, pages 5-9. It should even be noted that following the commencement of formal proceedings, PETITIONER offered to stipulate to any date for the evidentiary hearing, after conclusion of pre-hearing discovery. See *supra*, pages 5-9. RESPONDENT'S committees and staff continually informed PETITIONER of the progress of formal proceedings despite his repeated written statements that he would not return to California for the evidentiary hearing. See *supra*, pages 5-9; Appendix, p. 11. Only belatedly did PETITIONER take steps to retain counsel to appear at a formal hearing after a long passage of time.

The above-recited proceedings demonstrate neither Constitutional nor legal defect:

Compare *State v. Nielsen* (1965) 179 Neb. 55, 136 N.W.2d 355, 360, cert. den. (1966) 383 U.S.105; reh. den. 383 U.S.954 (attorney disbarred–no Constitutional right to have counsel

appointed in disciplinary proceedings despite accused attorney filing affidavit of poverty[9]); and

In re Holovachka (1964) 245 Ind. 483, 198 N.E.2d 381, 394-395, cert. den. (1965) 379 U.S.974 (attorney disbarred–no right to a continuance of disciplinary proceedings on alleged ground of illness of accused attorney where accused engaged counsel to represent him and where request for continuance by accused was not supported by medical witnesses as to the accused's medical condition).

CONCLUSION

For the foregoing reasons, RESPONDENT respectfully submits that PETITIONER has failed to present any substantial federal question incorrectly decided below. We submit that the decision below is fully correct and there are no special or important reasons presented for granting certiorari. Rules 19(1) and 24(1), Rules of the Supreme Court of the United States. RESPONDENT respectfully submits that certiorari should be denied.

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[9]In the past, RESPONDENT has appointed counsel for accused attorneys where an appropriate request and showing in support have been made. Here PETITIONER never made such a showing. Appendix at p. 12; *Hyland v. State Bar* (1963) 59 Cal.2d 765, 773-774, 31 Cal.Rptr. 329, 382 P.2d 369.

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